APPEAL NO. 93010
FILED FEBRUARY 16, 1993

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On June 9, 1992, and December 3, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant, claimant herein, did not show that her respiratory difficulties were caused by her work for the employer. Claimant asserts that Findings of Fact Nos. 3 through 6 are in error and adds that medical evidence shows that she was exposed to certain chemicals. Respondent, carrier herein, states that her medical condition arose other than in the workplace and is an ordinary disease of life.

DECISION

Finding that the order of the hearing officer is supported by sufficient evidence of record, we affirm.

The only issue at this hearing was whether claimant was injured in the course and scope of employment on or about (date of injury). The parties litigated the issue also as one of repetitive physical trauma that claimant knew may have been related to the employment on (date of injury). There was no issue that notice of the alleged injury was not timely given.

Claimant works for an air conditioning manufacturer. She testified that she first began work for employer in 1981 and has worked there continuously since November 1982. She stated that she first had trouble breathing in February 1989. Her physician at that time, (Dr. O), first diagnosed bronchitis, but she said he later said she had asthma. In January 1990 Dr. O sent her to (Dr. J), a pulmonary specialist. He tested claimant and diagnosed asthma in early 1990. Claimant referred to using glue at one time, but only said that she had been using it about two or three months when, in 1989, she began a period of approximately 20 months (except for one day) away from the job that lasted until October 1990 when she returned to work. She then worked without medication for approximately 18 months until February 10, 1992, after which time she has not returned to the job.

The following are some questions, and answers by claimant, about the causation of her respiratory problem:

Q All right. Is your complaint, then, about general fumes that are in the plant everyday; or is your complaint about the painting and the construction that was going on?

AWell, at that time, I never noticed it until they started doing the painting and construction in '92, you know, at that general time. You could smell

fumes, you know, on and off everyday on a daily basis. But, as for as to distinguish which fumes that bother me, I don't know. You know, I don't know which fumes that do as far as the exact fumes.

QWhat are you saying has caused your asthma?

AI really don't know.

QAll right.

AI feel that it has to be something out there because I don't normally have problems when I'm out from the plant.

QAll right. But, you were off 20 months; is that correct?

ARight.

QDuring that period of time, you were not exposed to what you are saying; but you were still sick enough that you couldn't go back to work for those 20 months.

AAt the time that I was going to see the regular medical doctor, when he referred me over to Dr. J in January of '90, he increased all of my medication. I never got over the symptoms. I constantly had symptoms. I constantly felt bad. And, it was--what it was, the medication was just enough to control the attack or whatever itself; but it never give me enough to get completely over everything that was bothering me.

QOkay. I think you stated that after you went back to work in October of 1990--and correct me if I'm wrong on my dates--but you worked about a year and six months without having to use any medication.

ARight.

Sketches drawn by claimant and by (Mr. C), safety manager for employer, varied somewhat as to just where claimant worked on line 2 in the plant. (Mr. C did not come to work for employer until after claimant departed in February 1992.) Both agreed that she worked on that line and it was in a large open area of the plant. The construction to which claimant referred was in another sector beyond a wall that separated it from line 2 and line 3 of assembly. Both said that there were large doors in the wall. Both agreed that there were large fans in the large area claimant worked in, and there was testimony that exhausts took air out of the building where painting was done. There was no testimony that claimant worked with anything that could cause asthma.

At the hearing in December 1992, claimant acknowledged on the stand that she does have shortness of breath.

Medical records of Dr. J and (Dr. P), a specialist in occupational medicine at University of Texas Health Center at Tyler, do show some belief that work was related to claimant's respiratory problem. Dr. J on February 24, 1992 wrote that a recent exposure to paint exacerbated claimant's bronchitis, "I believe this exacerbation is job related". On February 27, 1992, Dr. J wrote, "(b)ased on the history and physical findings, I believe this patient qualifies for workman's compensation as injury occurred at work and has been persistent." Then on December 1, 1992, Dr. J wrote, "(i)t is my opinion the patient has been symptomatic as a result of work related injury". Dr. P said in a letter dated August 31, 1992, "I cannot absolutely prove that your asthma is work related. However, I feel that the three episodes in which you had asthma symptoms develop at work are reasonably associated with the work place." She added that even if the asthma developed away from work, "substances at the work place or in other environments certainly could worsen this condition." Finally, on November 25, 1992, Dr. P, in another letter, referred to breathing tests, conducted on claimant after she had gone to the worksite for two and one-half hours, as indicating lower efficiency and said, "I believe there probably is something in the plant which causes your asthma attacks."

The carrier introduced testing done in August 1992 which showed levels of certain possible irritants as significantly below OSHA maximum standards. Carrier also showed that in February 1989, claimant listed her medical problem as bronchitis on an insurance form and stated that it did not begin at work. It showed also that she reported "asthmatic bronchitis" on December 6, 1990, which did not begin at work. Finally, the carrier showed that claimant reported an "upper respiratory infection" on September 30, 1991, as not beginning at work.

The carrier cited Bewley v. TEIA, 568 S.W.2d 208 (Tex. Civ. App.-Waco 1978, writ ref'd n.r.e.), Schaefer v. TEIA, 612 S.W.2d 199 (Tex. 1980), and Home Insurance Company v. Davis, 642 S.W.2d 268 (Tex. App.-Texarkana 1982, no writ) in support of its contention that an ordinary disease of life cannot be compensable unless it follows a compensable injury or an occupational disease. Another case, Hernandez v. TEIA, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ), considered whether asthma was compensable. The court noted that Hernandez developed symptoms each time she returned to work after having been forced to stay home. The court considered that the cause of asthma was not known and required expert medical testimony to address causation. It did not find that expert testimony linked inhalation of lint particles to "developing asthma" and affirmed an instructed verdict for the carrier. In considering the requirement that the disease be occupational to be compensable, this court said, "(a)s used in the statute, "ordinary diseases" encompass all diseases, except occupational diseases, which in turn are determined by their relationship

to employment." Later the court added, "(t)herefore, we find that it is not necessary to reach a determination of whether Hernandez' injury is an "ordinary disease"; rather, the test is whether there is evidence, either direct or indirect, of a causal connection between her disease and her employment. . . ."

Claimant disagrees with Findings of Fact Nos. 3, 4, 5, and 6. Finding of Fact No. 3 states that claimant did not establish what fumes or substances she was exposed to at work. The evidence that touched on this question was contained in Dr. P's letter of August 31st which said that a list of chemicals had been obtained from the employer. Dr. P said, "I understand that you were not directly working with many of these chemicals however, I did identify several substances which are known to cause asthma." (Dr. P then mentioned phenol, toluene, formaldehyde, and epichlorohydrin.) Listing substances that Dr. P says can cause asthma coupled with claimant's testimony that she did not know what caused her asthma could be considered by the hearing officer as not providing the linkage necessary to show causation; this finding is sufficiently supported by the evidence. Finding of Fact No. 4 states that claimant did not establish that any substance existed in sufficient quantities or sufficient proximity to cause her respiratory problem. In this regard, Dr. P, in the same letter says that if these substances were present in claimant's area, even in small quantities, "they may have made your asthma worse." This finding is sufficiently supported by the evidence referred to for the prior finding coupled with the evidence just described, which does not approach establishing that the workplace caused claimant's asthma. As in many of the statements of doctors in this case, this phrase of Dr. P only provides a possibility, not a probability. Finding of Fact No. 5 states that claimant failed to show that her problem was not an ordinary disease of life. According to the Hernandez case, *supra*, this finding is not necessary to the decision. *Also see* Texas Workers' Compensation Commission Appeal No. 92715, dated February 16, 1993. Finding of Fact No. 6 said that claimant did not establish that she was injured on (date of injury) at work. The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could give more weight to Dr. P's statement that she could not absolutely prove that the asthma was work related than to statements of both Dr. P and Dr. J that suggested possibilities or were not specific as to causation. He could consider that employer records show claimant had asthma symptoms away from the job. He could judge claimant while testifying before him during which time she apparently had trouble breathing. He could consider that her symptoms continued for 20 months away from the job and conversely that she worked at the job for approximately 18 months without a problem just before she had the last attack. His inability to find a cause at work for asthma is consistent with the Hernandez case and is sufficiently supported by evidence of record. Conclusion of Law No. 2 that claimant did not prove that she was injured on the job is sufficiently supported by Findings of Fact Nos. 3, 4, and 6. The order that claimant is due no medical or income benefits is not against the great weight and preponderance of the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge